

THE RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS TO STATE-COMPELLED VACCINATION: CONSTITUTIONAL AND OTHER CHALLENGES

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INTRODUCTION

Every fall, millions of school-age children engage in a scary, but necessary, ritual. They bring home vaccination forms that their teachers gave to them, with instructions that the papers can only be signed once their pediatricians have pricked the children with various needles and administered different inoculations. After a further glance at the forms, the parents learn that their children may not attend school without these vaccinations.¹ In several states, however, certain families can opt out of the vaccination requirement while their children remain registered for school.² These families must qualify for a statutory, religious or philosophical exemption from vaccination.

Such exemptions are shrouded in controversy, leading three states to declare them improper.³ The Supreme Court has not yet addressed the constitutionality of the exemptions; however, there are now stronger reasons to assess and rethink the exemptions to state-compelled vaccinations. As the number of alternative and "spiritual" treatments increase, and as access to incorrect information about the dangers of standard vaccinations increases through additional ave-

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¹ All states now require proof of vaccination as a condition of school enrollment against numerous diseases, most often diphtheria, measles, rubella, and polio. See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831 (2001-02) (providing an overview of the history of vaccination as it relates to school enrollment).

² Forty-seven states allow for religious exemptions, while seventeen states allow for philosophical exemptions from compelled vaccination. See discussion *infra* Parts I.B (The Religious Exemption), Part I.C (The Philosophical Exemption).

³ The three states are Mississippi, West Virginia, and Arkansas. See Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 283 (2003) ("Three states (Arkansas, Mississippi, and West Virginia) offer no religious exemption from school immunization requirements.").

nues of information, such as the Internet,⁴ the number of people who seek an inoculation exemption for their children for non-medical reasons will continue to increase.⁵ Additionally, when large epidemics pass, vaccination rates generally decline,⁶ increasing the danger of outbreaks.⁷ While outbreaks among communities that deny such vaccinations to their children are infrequent, such outbreaks have been devastating and remain a threat.⁸

This Comment provides a broad overview of the constitutional, public health, and implementation challenges of the religious and philosophical exemptions to state-compelled vaccination. I ultimately conclude that the exemptions are problematic for numerous reasons, among them constitutional concerns, and should be either eliminated or significantly revised. This Comment focuses on the religious exemption, as it is the more widespread and controversial of

⁴ See, e.g., Concerned Parents for Vaccine Safety, *Whats [sic] in a Shot?* (listing antifreeze, disinfectant, and aluminum as regular components of vaccines and suggesting that vaccines can cause Alzheimer's Disease and seizures, when no direct link has yet been found between vaccinations and these results), at <http://web.archive.org/web/20040213184301/home.sprynet.com/~gyrene/whatsi-1.htm> (last visited Mar. 19, 2005); Vaccination Liberation, *Vaccination Liberation Information* (stating incorrectly that "[v]accines often prove INEFFECTIVE in preventing disease"), at <http://www.vaclib.org/basic/investigate.htm> (last visited Mar. 19, 2005); *Vaccine Information* (providing articles and editorials about the alleged dangers of vaccination), at <http://www.vaccinetruth.org/> (last visited Mar. 19, 2005). But see Nicola Jones, *Link Between Vaccine and Autism "Entirely Flawed": Medical Journal Says It Regrets Publishing Wakefield's Research on MMR*, NATURE, Feb. 23, 2004 (reporting that a popular study suggesting a link between the measles, mumps, rubella ("MMR") vaccine and autism was flawed and that the journal that published the study regretted having made that assertion), available at <http://www.nature.com/nsu/040223/040223-1.html>.

⁵ In Colorado, the state with the lowest vaccination coverage, exemption rates have jumped tenfold over the past eleven years. In Oregon, the number of exemptions has doubled since 1999, largely due to an increase in religious exemptions. In Washington, exemptions have increased from 3.4% of kindergarten-aged children five years ago to 4.1%, or an increase of 2400 children. See Steve Mitchell, *Parents Opting Out of Vaccines for Kids*, UNITED PRESS INT'L, Nov. 13, 2003 ("The rates of parents that are taking non-medical exemptions to school immunization laws are increasing in many states and are probably increasing nationally."), available at <http://www.upi.com/view.cfm?StoryID=20031113-041813-2746r>.

⁶ See Hodge & Gostin, *supra* note 1, at 848-49 ("The effectiveness of the vaccine itself led to a progressive, albeit apathetic, argument: since the vaccine has worked, why should individuals continue to be subjected to the harms of vaccination unless there exists an actual threat of disease in the community?").

⁷ See Mitchell, *supra* note 5 ("This [increase in non-medical exemptions to school immunization laws] poses a greater risk of disease outbreaks and even poses risks to vaccinated children."); see also *State, Church Clash Over Faith Healing Beliefs*, BELOIT DAILY NEWS, Apr. 21, 1997 [hereinafter *Faith Healing Beliefs*] (discussing members of the Faith Tabernacle who were tried for involuntary manslaughter for allowing their children's illnesses to progress without any medical care), available at <http://www.beloitdailynews.com/articles/1997/04/21/export84624.txt>.

⁸ See *Faith Healing Beliefs*, *supra* note 7 (describing the Faith Tabernacle, a controversial religious sect in suburban Pennsylvania that was given exemption from childhood vaccination, and the 1991 deaths of five children from a measles outbreak).

the two. Additionally, the religious exemption raises more concerns, making reconsideration necessary.

In Part I of this Comment, I examine the history of both state-compelled vaccination and the religious and philosophical statutory exemptions adopted by several states. In Part II, I present several constitutional arguments for limiting exemptions and argue that religious exemption statutes might violate the Establishment Clause of the First Amendment⁹ because several types of religious exemption statutes violate one or more of the three prongs established by the Supreme Court in *Lemon v. Kurtzman*¹⁰ as the test to determine the constitutionality of laws challenged under the Establishment Clause.¹¹ I also argue that the religious exemption statutes violate the Equal Protection Clause because they discriminate against people who have unrecognized or non-established religious beliefs against vaccination, and because the statutes also violate the equal protection rights of those individuals who have received vaccinations yet remain vulnerable to the diseases. In Part III, I discuss additional, non-constitutional arguments for limiting both the religious and philosophical exemptions. I first discuss the importance of preserving the rights of unvaccinated children, who cannot decide for themselves if they wish to avoid the illnesses that the vaccinations are intended to protect against.¹² I suggest that the exemptions may be improper because they force children to become martyrs, and because they violate a child's right to an "open future," as defined by Joel Feinberg.¹³ Additionally, I argue that the state's compelling interest in preserving public health and safety justifies compulsory vaccination, without the option of exemption, as a prerequisite for school enrollment. I address in greater detail the cluster problem caused by groups of exemptors living in the same community and how this might undermine herd immunity.¹⁴ I also discuss the need to reconsider the current religious exemption system because of the difficulty associ-

⁹ U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion"); see *infra* Part II.A.1 (First Amendment Concerns: The Establishment Clause).

¹⁰ 403 U.S. 602 (1971).

¹¹ See *infra* Part II.A.1 (First Amendment Concerns: The Establishment Clause) (listing the prongs of the *Lemon* test and explaining how the current religious exemption statutes each violate different prongs of the test).

¹² See *infra* Part III.A.1 (Martyrdom and a Court's Consideration of a Child's Individual Views and Rights).

¹³ See *infra* Part III.A.2 (A Child's Right to an "Open Future"); see also Joel Feinberg, *The Child's Right to an Open Future*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124 (William Aiken & Hugh LaFollette eds., 1980) (describing the concept of an "open future").

¹⁴ See *infra* Part III.B.1 (The Threat to Public Health).

ated with defining exemption criteria and applying a proper test for who might qualify for an exemption.¹⁵

Finally, in Part IV I conclude that the current exemption system is in need of reformation and reconsideration, and I propose several possible solutions. Such solutions include, but are not limited to, creating a system of mandatory vaccination with no exemptions, and pursuing several fundamental changes and ideal statutes that might be adopted to help resolve the problems associated with exemption statutes. I also put forth a number of more practical solutions, including public health and informational campaigns about the benefits of vaccination with the goals of promoting vaccination and dispelling common myths surrounding vaccination.¹⁶

I. COMPELLED VACCINATION AND EXEMPTION BACKGROUND

Before assessing the constitutionality of the religious and philosophical exemptions, I will first consider the history and development of both state-compelled vaccinations and the subsequent development of these exemptions.

A. State-Compelled Vaccinations

The debate surrounding the regulation of vaccination started when local governments in colonial America began controlling physician inoculation,¹⁷ shortly after Dr. Edward Jenner created the smallpox vaccine in 1796.¹⁸ The first laws requiring immunization appeared in the United States in the early nineteenth century.¹⁹ By 1905, only six states did not have a smallpox vaccination statute.²⁰

¹⁵ See *infra* Part III.B.2 (The Impracticability of Regulation and Proper Enforcement).

¹⁶ See *infra* Part IV (Possible Solutions).

¹⁷ See GEORGE ROSEN, A HISTORY OF PUBLIC HEALTH 162–65 (1958) (detailing the work by Johann Peter Frank in promoting areas such as child health, marriage, public hygiene, food, and public health).

¹⁸ Dr. Jenner is considered the first scientist of immunology for his success in transforming smallpox from “an uncontrollable epidemic into a manageable, avoidable disease.” Hodge & Gostin, *supra* note 1, at 840; see also DERRICK BAXBY, JENNER’S SMALLPOX VACCINE: THE RIDDLE OF VACCINIA VIRUS & ITS ORIGINS (1981) (analyzing the origins of Jenner’s smallpox vaccine); EDWARD JENNER, AN INQUIRY INTO THE CAUSES AND EFFECTS OF VARIOLAE VACCINAE, A DISEASE, DISCOVERED IN THE WESTERN COUNTIES OF ENGLAND, PARTICULARLY GLOUCESTERSHIRE AND KNOWN BY THE NAME OF COW POX (Classics of Medicine Library 1978) (1798) (describing Jenner’s success and detailing specific findings made during his 1796 smallpox experiment). Jenner has been called the “Father of Vaccination.” Hodge & Gostin, *supra* note 1, at 838. He also helped place vaccination at the forefront of public health. See Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *Impact of Vaccines Universally Recommended for Children—United States, 1900–1998*, 281 JAMA 1482, 1482–83 (1999) (listing vaccination as one of the top ten public health achievements of the twentieth century).

¹⁹ FRANK P. GRAD, PUBLIC HEALTH LAW MANUAL 72–73 (2d ed. 1997); see also WILLIAM P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 132 (1894)

In that year, for the first time, the Supreme Court addressed the issue of state-compelled vaccination and established the right of a state to compel an individual to receive a vaccination. In *Jacobson v. Massachusetts*,²¹ the Court ruled that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."²² In 1922, the Court further upheld a local government mandate that required vaccination as a prerequisite for enrolling in school in *Zucht v. King*.²³ These two cases, combined with the "commitment of lawmakers to the principle of compulsory vaccination as a prerequisite to school enrollment"²⁴ allowed for one of the "most momentous achievements" of public health during the nineteenth and twentieth centuries: a dramatic reduction in morbidity and mortality due to vaccine preventable illnesses.²⁵ The average lifespan of individuals living in the United States has increased more

("Compulsory vaccination has been instituted . . . by the laws of several States, in respect to minors. City ordinances regulate it, but the indirect methods of excluding children not vaccinated from schools and factories, or, in cases of immigrants, insisting upon quarantine, and the offer of free vaccination . . . are more effective."), *quoted in Hodge & Gostin, supra* note 1, at 849 n.126; Charles L. Jackson, *State Laws on Compulsory Immunization in the United States*, 84 PUB. HEALTH REP. 787 (1969) (stating that Massachusetts enacted the first mandatory vaccination law in 1809).

²⁰ William Fowler, *Principal Provisions of Smallpox Vaccination Laws and Regulations in the United States*, 56 PUB. HEALTH REP. 167 (1941) (enumerating statistics on smallpox vaccination in the United States). *But see* William Fowler, *State Diphtheria Immunization Requirements*, 57 PUB. HEALTH REP. 325 (1942) (noting that compulsory immunization laws for diseases other than smallpox were not enacted until the late 1930's). *See generally* Hodge & Gostin, *supra* note 1, at 849-50 ("By . . . 1905, many states had already required citizens to submit to smallpox vaccination, among other diseases.").

²¹ 197 U.S. 11 (1905).

²² *Id.* at 25. The defendant challenged a Massachusetts compulsory smallpox vaccination statute on the grounds that "his liberty [was] invaded when the state subject[ed] him to fine or imprisonment for neglecting or refusing to submit to vaccination." *Id.* at 26. He further contended that

a compulsory vaccination law [was] unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.

Id.

²³ 260 U.S. 174, 176 (1922); *see also* *People ex rel. Hill v. Bd. of Educ.*, 195 N.W. 95, 100 (Mich. 1923) (showing that state supreme courts also regularly upheld school vaccination requirements for enrollment).

²⁴ Silverman, *supra* note 3, at 277; *see also* Kathryn M. Edwards, *State Mandates and Childhood Immunizations*, 284 JAMA 3171, 3172 (2000) (noting that immunization laws help alleviate health risks); Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States—The Role of School Immunization Laws*, 17 VACCINE S19, S19 (1999) (stating that immunization laws have played a key role in reducing preventable diseases).

²⁵ Silverman, *supra* note 3, at 281-82.

than thirty years since 1900,²⁶ and twenty-five years of this gain are attributable to advances in public health, most prominently, vaccination.²⁷ A public health report published in 1857, conducted by Dr. John Simon, and commissioned by the Queen of England, concluded that, "in the several decades following the adoption of vaccination policies in many European countries, mortality rates due to smallpox declined over eighty-eight percent."²⁸

A small but vocal antivaccinationist minority developed as the first states began to require vaccination, and expanded when cities began to require all children wishing to enroll in public schools to provide evidence of vaccination.²⁹ Antivaccinationists pointed to smallpox outbreaks in Europe at public elementary schools that required vaccination³⁰ as evidence that school vaccination policies were ineffective and failed to prevent outbreaks. Antivaccinationists portrayed vaccines as "foreign substances, or poisons, capable of causing more harm than good."³¹ Many antivaccinationists also painted vaccines as a "surgical operation"³² as opposed to routine care.³³ Further, public health authorities "were characterized as abusive, untrustworthy, and paternalistic,"³⁴ and resisting the efforts of public health officials "was

²⁶ See Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Ten Great Public Health Achievements—United States, 1900–1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241 (1999) [hereinafter *Ten Great Public Health Achievements*], available at <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00056796.htm>. For additional information on the benefits of vaccination in the United States with regards to reducing illness and death among children, see Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Achievements in Public Health, 1900–99 Impact of Vaccines Universally Recommended for Children U.S., 1990–1998* 18 MORBIDITY & MORTALITY WKLY. REP. 243 (1999) (listing vaccination as the first of ten great health achievements).

²⁷ *Ten Great Public Health Achievements*, *supra* note 26, at 241.

²⁸ Hodge & Gostin, *supra* note 1, at 842.

²⁹ *Id.* at 844 ("Although vaccination was generally accepted by the population of colonial America, minority opposition arose in many quarters.").

³⁰ See *id.* at 847. The authors note:

Historic accounts of a short-lived smallpox outbreak in Gloucester, England in 1890 are illustrative [of the debate between public health officials and antivaccinationists]. Despite a school vaccination policy in place at the time, the outbreak was traced to several children who were infected while attending public elementary school. Almost 2000 people were infected, including 706 children, and 484 persons died.

Id. (footnote omitted) (discussed in Editorial, *Topics of the Times*, N.Y. TIMES, Nov. 26, 1897, at 5–6).

³¹ *Id.* at 848.

³² *Id.*

³³ See, e.g., *Cram v. Sch. Bd.*, 136 A. 263 (N.H. 1927) (describing the claim of a petitioner who argued that his child should be exempt from state compelled vaccination because "vaccination consists of performing a surgical operation by injecting a poison, the ingredients of which are not known, into the blood of [his] daughter and that will endanger her health and life, and he will not permit it to be done").

³⁴ Hodge & Gostin, *supra* note 1, at 849; see also J.N. HAYS, *THE BURDENS OF DISEASE* 280 (1998) (mentioning that early opponents of vaccination viewed it as dangerous).

equated with fighting government oppression.”³⁵ Other antivaccinationists acknowledged the efficacy of vaccinations, yet also argued that since the vaccines had already worked, why should individuals “continue to be subjected to the harms of vaccination unless there exists an actual threat of disease in the community?”³⁶ Finally, many of those against vaccines argued that the treatment violated their sacred religious beliefs.³⁷ Most of the above arguments, whether rational or irrational in light of current scientific knowledge, are used by present-day antivaccinationists and those in favor of exemptions.

The Supreme Court has not yet addressed whether the Constitution permits states to offer religious-based exemptions; however, many individuals believe that the exemption statutes, specifically the religious exemption, will be deemed unconstitutional because of the Establishment Clause and equal protection arguments discussed below.³⁸

B. *The Religious Exemption*

Currently, forty-seven states offer some form of religious exemption from school immunization laws.³⁹ There are two different ways these states generally classify qualified exponents.⁴⁰ A minority of states limit their religious exemption to those who belong to “organized,” “recognized,” or “established” religions.⁴¹ Some states evaluate

³⁵ Hodge & Gostin, *supra* note 1, at 849.

³⁶ *Id.*

³⁷ See Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 112–13 (1997) (supporting the argument that the state must advance public health through voluntary means before it can force citizens to subordinate their religious beliefs).

³⁸ See *infra* Part II.A.1 (First Amendment Concerns: The Establishment Clause); see also Silverman, *supra* note 3, at 281 (“[T]he Court’s extensive history of First Amendment accommodations in other contexts, coupled with numerous state and lower federal court decisions, directly addressing constitutional issues of religious exemption provisions in state vaccination laws, suggest childhood immunization laws [compelling vaccination as a prerequisite for school enrollment] are not *per se* unconstitutional.”).

³⁹ Mississippi, West Virginia, and Arkansas are the exceptions. See Silverman, *supra* note 3, at 282 n.31.

⁴⁰ *Id.* at 282.

⁴¹ *Id.*; see, e.g., 25 TEX. ADMIN. CODE § 97.62(2) (West 2001) (“A signed affidavit must be presented by the child’s parent or guardian stating that the immunization conflicts with the tenets and practices of a recognized religious organization of which the applicant is an adherent or member.”).

As a result of the Conscientious Objector cases arising out of the Vietnam War, however, many states have removed this language from their statutes. Silverman, *supra* note 3, at 282; see also *United States v. Seeger*, 380 U.S. 163, 184 (1965) (defining “religious belief” to mean a belief that “occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption”); *Int’l Soc’y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981) (holding “any belief that is ‘arguably religious’ is considered ‘religious’ for the sake of free exercise analysis”).

an individual applying for religious exemption to determine if his beliefs are "genuinely and sincerely held,"⁴² while other states simply require applicants to submit a form stating that they oppose vaccination on religious grounds.⁴³

Mississippi, West Virginia, and Arkansas do not allow a religious exemption from the school vaccination requirement.⁴⁴ In 1979, the Mississippi Supreme Court declared its religious exemption statute unconstitutional,⁴⁵ citing many of the arguments made generally against both religious and philosophical exemptions. The court ruled that the exemption violated the equal protection rights of those children who did not qualify for exemption,⁴⁶ and said that a religious exemption provision "would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute."⁴⁷ The court also ruled in the interest of public health and said that the state had an "overriding and compelling public interest"⁴⁸ to protect children from harm, "even when such rights conflicted with the religious rights of the parents seeking exemptions for their children."⁴⁹ The court's ruling directly follows the arguments of several scholars and groups against the religious exemption system, as I discuss below in Part II.

C. The Philosophical Exemption

At least seventeen states allow philosophical exemptions,⁵⁰ which carry an even lower burden of proof than the religious exemptions to

⁴² *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

⁴³ See Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645 (2001) (describing qualifying procedures for exemptions).

⁴⁴ Silverman, *supra* note 3, at 282 n.31.

⁴⁵ *Brown v. Stone*, 378 So. 2d 218, 224 (Miss. 1979).

⁴⁶ *Id.* at 222-23.

⁴⁷ *Id.* at 223.

⁴⁸ *Id.* at 222.

⁴⁹ Silverman, *supra* note 3, at 283; see also *Brown*, 378 So. 2d at 221 ("Is it mandated by the First Amendment to the United States Constitution that innocent children, too young to decide for themselves, are to be denied the protection against crippling and death that immunization provides because of a religious belief adhered to by a parent or parents?").

⁵⁰ See Daniel A. Salmon & Andrew W. Siegel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscription*, 116 PUB. HEALTH REP. 289, 290 (2001) (describing the system of vaccination laws and noting the available exemptions); Ross D. Silverman & Thomas May, *Private Choice Versus Public Health: Religion, Morality, and Childhood Vaccination Law*, 1 MARGINS 505, 516-17 (2001) (discussing Colorado's exemption and the ease with which many states allow exemption from vaccination).

gain a waiver from school vaccination requirements.⁵¹ These exemptions vary depending on the state, and they allow the parent or student to "assert in writing that he/she has another reason to object to vaccines."⁵² In many of these states, individuals must object to all vaccines and not just a particular vaccine in order to use the philosophical objection.⁵³ As in the case of religious exemption provisions, the wording of each state's philosophical exemption provisions vary; they may, for example, recognize objections based on "personal,"⁵⁴ "philosophical,"⁵⁵ or "moral convictions,"⁵⁶ or "other."⁵⁷ In 1990, twenty-two states allowed a philosophical exemption to compelled vaccina-

⁵¹ See Salmon & Siegel, *supra* note 50, at 290 (describing statutory exemption schemes). Additionally, Minnesota, a state with no religious exemption, has a broad philosophical exemption statute; a child can be held exempt from compulsory vaccination requirements if the parent or guardian provides a notarized signed statement to an administrator stating that the individual was not vaccinated because of "conscientiously held beliefs." MINN. STAT. ANN. § 121A.15(3) (d) (West 2003). The statute serves as an example of how philosophical exemption statutes are typically worded:

If a notarized statement signed by the minor child's parent or guardian or by the emancipated person is submitted to the administrator or other person having general control and supervision of the school or child care facility stating that the person has not been immunized as prescribed in subdivision 1 because of the conscientiously held beliefs of the parent or guardian of the minor child or of the emancipated person, the immunizations specified in the statement shall not be required. This statement must also be forwarded to the commissioner of the department of health.

Id.

⁵² Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249, 260–61 (1995).

⁵³ See National Vaccine Information Center, *State Exemptions* (describing generally the philosophical exemption), at <http://www.909shot.com/Issues/state%20exemptions.htm> (last visited Mar. 19, 2005).

⁵⁴ Colorado is one state with such wording. See COLO. REV. STAT. §§ 25-4-1704(2), 25-4-1704(4) (b) (Supp. 1996) ("An infant shall be exempted from receiving the required immunizations . . . [u]pon submitting a statement signed by one parent or guardian that such parent or guardian adheres to a religious belief whose teachings are opposed to immunizations, or . . . has a *personal* belief that is opposed to immunization." (emphasis added)).

⁵⁵ Maine uses this term in its exemption statute. See ME. REV. STAT. ANN. tit. 20-A, § 6355(3) (West 1999) (stating that a child may not be enrolled without an immunization certificate except when "[t]he parent states in writing a sincere religious belief which is contrary to the immunization requirement of this subchapter or an opposition to the immunization for moral, *philosophical* or other personal reasons" (emphasis added)).

⁵⁶ Vermont is an example of a state with this phrasing in its philosophical exemption statute. See VT. STAT. ANN. tit. 18, § 1122(a)(3) (2000) ("A person may remain in school without a required immunization: . . . If the person, or . . . the person's parent or guardian states in writing that the person, parent or guardian has religious beliefs or *moral convictions* opposed to immunization." (emphasis added)).

⁵⁷ Michigan uses this wording in its philosophical exemption statute. See MICH. COMP. LAWS § 333.9215 (1999) ("A child is exempt from this part if a parent, [etc.] . . . presents a written statement to the administrator of the child's school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or *other* objection to immunization." (emphasis added)); MICH. STAT. ANN. § 14.15(9215) (Michie 1999) (same); see also Severyn, *supra* note 52, at 261 (cataloguing states with philosophical exemptions).

tion.⁵⁸ However, several state legislatures have since deleted the philosophical exemption provisions from their state codes following encouragement by the state departments of health.⁵⁹

In states that have philosophical exemptions, parents claim the exemption with increasing regularity.⁶⁰ Additionally, in states that offer both exemptions, the number of philosophical exemptions is far greater than the number of religious and medical exemptions.⁶¹ Much of this Comment addresses the religious exemption, as the philosophical exemption exists only in a minority of states. Additionally, the philosophical exemption does not present the Establishment Clause threat that the religious exemption presents because philosophical exemption statutes do not specifically address religious beliefs in the way that religious exemption statutes do. Finally, the philosophical exemption statutes are prone to less abuse (because the philosophical statutes have little or no threshold and are therefore nearly incapable of abuse) than the religious exemption statutes.

II. THE CONSTITUTIONAL CASE FOR LIMITING EACH EXEMPTION

A. *The Religious Exemption*

1. *First Amendment Concerns: The Establishment Clause*

The religion clauses of the First Amendment state that "Congress shall make no law [1] respecting an establishment of religion or [2] prohibiting the free exercise thereof."⁶² The first clause is often called the Establishment Clause, while the second is referred to as the

⁵⁸ U.S. Dep't of Health and Human Servs., Pub. Health. Serv., Ctrs. for Disease Control and Prevention, State Immunization Requirements 1991-1992. Additionally, Delaware and Montana deleted their philosophical exemption provisions "just prior to publication of noted survey." Severyn, *supra* note 52, at 261 n.84.

⁵⁹ See Severyn, *supra* note 52, at 261 ("For example, Missouri, Indiana, and Nebraska lost their philosophical exemptions in 1992, 1993, and 1994, respectively.").

⁶⁰ See, e.g., Daniel R. Feikin et al., *Individual and Community Risks of Measles and Pertussis Associated with Personal Exemptions to Immunization*, 284 JAMA 3145, 3147 (2000) (describing an eighty-three percent increase in philosophical exemptions in a single year in Colorado).

⁶¹ *Id.* (stating that philosophical exemptions comprised eighty-seven percent of total exemptions granted in Colorado in 1998); see also Donald G. McNeil Jr., *When Parents Say No to Child Vaccinations*, N.Y. TIMES, Nov. 30, 2002, at A1 (describing the health ramifications of philosophical exemption statutes); Silverman, *supra* note 3, at 284-85 (noting the rise in popularity of exemption statutes).

⁶² U.S. CONST. amend. I. The First Amendment has been made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment"); see, e.g., Sherry E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 306 (1984) (noting that the Establishment Clause creates grounds for challenging regulations of public morality).

Free Exercise Clause.⁶³ While both sides of the exemption debate have used both clauses, those who argue that religious exemptions are unconstitutional tend to use the Establishment Clause to bolster their point, contending that the religious exemption statutes improperly advance religion.⁶⁴ Those in favor of the religious exemption argue that eliminating the exemption and requiring children of these individuals to submit to vaccinations before attending school violates the Free Exercise Clause.⁶⁵

At the very minimum, the Establishment Clause ensures that “[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁶⁶ In *Lemon v. Kurtzman*,⁶⁷ the Supreme Court established a three-pronged test that the Court has consistently used to determine the constitutionality of laws challenged under the Establishment Clause.⁶⁸ In order for a statute to be deemed constitutional under the test, it must satisfy the following three requirements: (1) the legislature must have had a secular purpose for adopting the enactment in question; (2) the primary effect of the law to be scrutinized must be one that neither advances nor inhibits religion; and (3) the statute must not result in an excessive entanglement of government with religion.⁶⁹

Two out of the three tests that states use to determine an applicant's eligibility for religious exemption fail under one or more of the prongs of the *Lemon* test. Those states that require an applicant to belong to an “organized,” “recognized,” or “established” religion employ an exemption test that likely violates both the second and third prongs because such statutes can be construed to “advance” certain recognized religions while “inhibiting” the practice of other, non-recognized faiths. Additionally, such statutes result in “excessive” government entanglement with religion.⁷⁰

⁶³ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 967–68 (1997); see also Hodge & Gostin, *supra* note 1, at 858–59 (describing traditional interpretations of the Establishment and Free Exercise Clauses in the context of state-compelled vaccinations).

⁶⁴ See Hodge & Gostin, *supra* note 1, at 860 (“To the extent the Establishment Clause forbids governments from passing laws which favor religious preferences, it seems arguable that states may not exempt religious objectors from school vaccination requirements.”).

⁶⁵ See Caroline L. Kraus, Note, *Religious Exemptions—Applicability to Vegetarian Beliefs*, 30 HOFSTRA L. REV. 197, 199 (2001) (“Religious advocates argue that if mandatory vaccinations are contrary to the teachings of a religious belief, forcing them to submit to vaccination violates the constitutional right to free exercise of religion.”).

⁶⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

⁶⁷ 403 U.S. 602 (1971).

⁶⁸ See generally Kraus, *supra* note 65, at 205 (providing further background on *Lemon v. Kurtzman*).

⁶⁹ See *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89 (E.D.N.Y. 1987) (discussing the *Lemon* test).

⁷⁰ *Id.*

In *Sherr v. Northport-East Northport Union Free School District*, the court ruled that the requirement that parents be "bona fide members of a recognized religious organization"⁷¹ to be exempt on religious grounds from a school vaccination requirement violates both the Free Exercise and Establishment Clauses.⁷² The *Sherr* court applied the *Lemon* test and held that the requirement under section 2164 of the Public Health Law failed both the second and third prongs.⁷³ The court held that the language of the statute, which limited the eligible class of those who qualified for exemption, "inhibited the religious practices of those individuals who were opposed to vaccinations on religious grounds but did not belong to groups that the state recognized as bona fide religious organizations,"⁷⁴ and therefore violated the second prong.⁷⁵ The court said that those individuals who were members of "bona fide" religious organizations were permitted to live according to the tenets of their religious beliefs,⁷⁶ while those individuals not belonging to recognized religious groups were forced to "either act contrary to their religious beliefs or deny their children an education."⁷⁷ Religious exemption statutes that require an applicant to belong to an "organized" religion therefore violate the second prong because they advance the practice of the "organized" religions included in the statutes, while inhibiting the practice of religions excluded by the statutes. The court also found that the statute resulted in the excessive entanglement of the government in religious affairs because it "gave official recognition to certain religions and not others, thereby involving the government in religious matters to a degree not permitted by the Constitution."⁷⁸

If the Supreme Court is confronted with one of the many state statutes similar to the one addressed in *Sherr*, it should follow the *Sherr*

⁷¹ *Id.* at 98.

⁷² *See id.* ("Defendants' restriction of the exception in such a manner violates both religion clauses of the First Amendment.")

⁷³ *Id.* at 89 ("The clause . . . at issue in this litigation runs afoul of at least two of the three elements of the *Lemon* test.")

⁷⁴ Kraus, *supra* note 65, at 205; *see also Sherr*, 672 F. Supp. at 89 (holding that the clause at issue was invalid).

⁷⁵ *See Sherr*, 672 F. Supp. at 89 (noting that states may neither advance nor inhibit religion).

⁷⁶ *Id.* at 90. According to the court,

[The statute] makes available to members of certain religious organizations to which the state has given some sort of official recognition a statutory benefit for which other individuals who may belong to either an unrecognized religious group or possess their own personal religious beliefs are not eligible. The establishment clause surely cannot mean much if a preferential restriction such as that contained in [this statute] can pass constitutional muster.

Id.

⁷⁷ Kraus, *supra* note 65, at 205; *see also Sherr*, 672 F. Supp. at 89 (holding that such a scheme "blatantly" violates the Constitution).

⁷⁸ Kraus, *supra* note 65, at 205; *see also Sherr*, 672 F. Supp. at 89 (holding that the government must not excessively involve itself with religion).

line of arguing and rule that such an exemption statute violates the second and third prongs of the *Lemon* test. In addition to the *Sherr* court's argument that the second prong inhibits the religious practices of those seeking exemption who do not belong to a "bona fide" religious organization, such statutes also improperly advance certain religious groups. Several state courts have ruled that granting privileges to "recognized churches" violates the Establishment Clause⁷⁹ because "certain religious denominations cannot be granted privileges not afforded to other denominations or religions."⁸⁰ These courts have ruled that permitting individuals that belong to religious groups that forbid vaccination to opt out of the vaccination requirement while requiring all other individuals belonging to religious groups that allow vaccination to be vaccinated before attending school is an example of the state providing privileges to particular religious groups.⁸¹ The exemption statutes that require individuals to belong to certain "recognized" religions to qualify for exemption therefore violate the second prong of the *Lemon* test, as such statutes both improperly inhibit and advance the practice of religion for certain groups.

The Court should also rule that such exemption statutes violate the third *Lemon* prong because the "restriction of [an] exception to 'recognized religious organizations' clearly requires that the govern-

⁷⁹ Several courts have ruled differently, saying that a requirement that parents be members of a "nationally recognized and established church or religious denomination" to qualify for a religious exemption does not violate the Establishment Clause. See, e.g., *Kleid v. Bd. of Educ.*, 406 F. Supp. 902, 904-06 (W.D. Ky. 1976).

⁸⁰ *Mass. Citizens for Children, Jeopardizing Children's Lives* (1994) [hereinafter *Jeopardizing Children's Lives*], at http://www.masskids.org/jcl/jcl_1.html. Courts have similarly held. For example, the Supreme Court of Maryland concluded:

However broadly the phrase "recognized church or religious denomination" could reasonably be construed, the statutory language certainly fails to encompass personal religious beliefs like [the petitioner's] which are not associated with any church or denomination. . . .

Consequently, . . . "[m]embership in a recognized religious group cannot be required as a condition of exemption from vaccination." We hold that [the statute] contravenes the Establishment Clause of the First Amendment.

Davis v. State, 451 A.2d 107, 113-14 (Md. 1982) (citations omitted); see also *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (stating that those belonging to a "recognized church or religious denomination . . . enjoy the benefit of an exemption which is denied to other persons whose objections to vaccination are also grounded in religious belief," and that "[t]his preferred treatment of one group and discrimination against the other violates the First and Fourteenth Amendments of the United States Constitution"); *Maier v. Besser*, 341 N.Y.S.2d 411, 414 (N.Y. Sup. Ct. 1972) ("[I]f the Legislature desires to exempt for religious grounds a certain class of persons, it must do so on a logical and non-discriminatory basis.").

⁸¹ See *Jeopardizing Children's Lives*, *supra* note 80 ("In addition, a number of state courts have indicated that granting privileges to 'recognized churches' probably violates the 1st Amendment's prohibition of an establishment of religion, that is, certain religious denominations cannot be granted privileges not afforded to other denominations or religions.").

ment involve itself in religious matters to an inordinate degree.”⁸² When a state conditions a statutorily created exemption on membership in a religious denomination, the state has “bestowed a blessing of governmental approval.”⁸³ This serves as “some sort of official recognition [of] a statutory benefit for which other individuals who may belong to either an unrecognized religious group or possess their own personal religious beliefs are not eligible.”⁸⁴ Such involvement qualifies as excessive government entanglement in religious affairs to a degree not permitted by the Constitution,⁸⁵ and therefore violates the third prong of the *Lemon* test. This involvement should thus be deemed to violate the Establishment Clause.

Additionally, the Court should rule that a second type of exemption statute, involving an assessment of an individual's religious beliefs and whether these beliefs are genuinely and sincerely held,⁸⁶ also violates the third prong of the *Lemon* test and therefore violates the Establishment Clause. Under the sincerity test, the party desiring exemption must demonstrate to the satisfaction of the court that his or her asserted beliefs are “sincerely” held.⁸⁷ Evidence a court might use in a sincerity analysis includes (1) whether the adherent acted inconsistently with the belief at issue; (2) whether the adherent materially gained by masking secular beliefs with a religious veneer; and (3) the religion's history and size.⁸⁸ Courts must further exercise “extreme caution”⁸⁹ when conducting a sincerity analysis because the inquiry “in essence puts the individual on trial for heresy.”⁹⁰ The court therefore becomes excessively involved and “entangled” in an analysis of an individual's religious beliefs when it engages in a sincerity analysis.⁹¹ This excessive entanglement therefore does not satisfy the third prong of the *Lemon* test, and therefore this form of exemption statute violates the Establishment Clause.

The most simple school exemption test of the three tests that currently exist, the form submission, is the least likely to fail under the

⁸² *Sherr*, 672 F. Supp. at 90.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.* (“The establishment clause surely cannot mean much if a preferential restriction such as that contained in [such statutes] can pass constitutional muster.”).

⁸⁶ *See, e.g.*, 25 TEX. ADMIN. CODE § 97.62(2) (West 2001) (allowing for religious exemptions).

⁸⁷ *See, e.g.*, *Lewis v. Sobol*, 710 F. Supp. 506, 514–15 (S.D.N.Y. 1989) (inquiring into the sincerity of plaintiff's beliefs); *Sherr*, 672 F. Supp. at 94 (same); *In re Christine M.*, 595 N.Y.S.2d 606, 614 (N.Y. Fam. Ct. 1992) (same).

⁸⁸ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (holding that the International Society for Krishna Consciousness is a religion because it passes a sincerity test).

⁸⁹ *Kraus, supra* note 65, at 215.

⁹⁰ *Sherr*, 672 F. Supp. at 94.

⁹¹ *See id.* at 89 (discussing the *Lemon* test).

three prongs of the *Lemon* test because it is the least invasive and requires no further evaluation beyond the applicant's own word; there is therefore no court involvement or evaluation of the specific religion or the individual's sincere beliefs. This single type of exemption might survive a challenge under the Establishment Clause; however, this exemption has many other problems, most notably its abuse by many who simply wish to avoid vaccination.⁹²

2. *Equal Protection*

Many groups and individuals argue that, similar to the Establishment Clause arguments discussed above, the exemption statutes violate the Equal Protection Clause because they discriminate against people who have unrecognized or unestablished religious beliefs against vaccination.⁹³ The Equal Protection Clause prohibits the government from intentionally discriminating against individuals of suspect classes; more specifically, classes based on race, religion, national origin, or sex.⁹⁴ The Supreme Court has defined a suspect class as a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁹⁵ A court could classify individuals who belong to unrecognized religious groups as members of a "suspect class" because they historically have been excluded by statutes that provide privileges or protections for members of certain established religious groups. In *Dalli v. Board of Education*,⁹⁶ the Supreme Judicial Court of Massachusetts ruled that a state exemption for objectors who believed in "recognized church[es] or religious denomination[s]" violated the Equal Protection Clause by giving preferential treatment to certain groups while ignoring others who have sincere, though unrecognized, religious objections.⁹⁸ In *Brown v.*

⁹² See discussion *infra* Part III.B.2 (The Impracticality of Regulation and Proper Enforcement).

⁹³ See discussion *infra* Part III.B.2 (The Impracticality of Regulation and Proper Enforcement); see also James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1326 (1996) (demonstrating that "a compelling legal argument against religious exemptions to child welfare and education laws is that they discriminate among groups of children . . . on an arbitrary and improper basis—namely, the religious beliefs of other persons").

⁹⁴ See, e.g., Leah Hammett, Comment, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CAL. L. REV. 1373, 1394–95 (1986) (assessing whether children with AIDS would constitute a "suspect class").

⁹⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁹⁶ 267 N.E.2d 219 (Mass. 1971).

⁹⁷ *Id.* at 220.

⁹⁸ See *id.* at 223 ("[This statute] extends preferred treatment to adherents and members 'of a recognized church or religious denomination' who object to vaccination on religious

Stone, the Mississippi Supreme Court held that religious exemption policies violate the Equal Protection Clause because they "discriminate against the great majority of children whose parents have no such religious convictions."⁹⁹

The exemption statutes also violate the equal protection rights of those individuals who have received vaccinations yet remain vulnerable to the diseases for which they been vaccinated. Vaccines are not one hundred percent effective.¹⁰⁰ Therefore, a percentage of children who have been vaccinated will still be "susceptible to vaccine-preventable diseases in the case of an outbreak."¹⁰¹ This created an environment in a Utah community with a "significant percentage"¹⁰² of exempted individuals which made it possible for a "six (viral) generation-long outbreak" of measles where "more than half of those who eventually contracted the disease had been vaccinated."¹⁰³ Because a minority group of children have the right to "basic protections of life and health afforded to all other children, [a] policy [in favor of exemption] is" therefore "an unconstitutional deprivation of equal protection under the 14th Amendment."¹⁰⁴

B. The Philosophical Exemption

Although the philosophical exemption is available in fewer states than the religious exemption, individuals are increasingly taking advantage of these exemptions. In states offering both religious and

grounds. . . . This preferred treatment of one group and discrimination against the other violates the First and Fourteenth Amendments." (citations omitted)).

⁹⁹ *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979).

¹⁰⁰ See Tex. Med. Ass'n, *Health and Science: Arguments Against Conscientious Objections for Exemption from Immunization* (2003) ("Immunizations are only 90 percent to 95 percent effective so if everyone is properly immunized 5 percent to 10 percent of the population still has a chance of contracting the disease."), available at http://www.texmed.org/has/immunization_exempt.asp; see also SILVERMAN, *supra* note 3, at 512 (addressing the need to "recognize that the dangers imposed by refusal of vaccination are not wholly individual").

¹⁰¹ SILVERMAN, *supra* note 3, at 512.

¹⁰² *Id.* (citing Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risk of Measles*, 282 JAMA 47, 47 (1999)).

¹⁰³ See *id.* (citing Salmon et al., *supra* note 102, at 47).

¹⁰⁴ *Jeopardizing Children's Lives*, *supra* note 80. The Supreme Court has rejected "equal protection arguments that school vaccination laws discriminate against school children to the exclusion of others" through principles articulated in cases like *Adams v. Milwaukee*, 228 U.S. 572 (1913). *Hodge & Gostin*, *supra* note 1, at 862. In *Adams*, the Court held that vaccination regulations that treated cows held outside the city differently than those held inside the city did not violate the Fourteenth Amendment. 228 U.S. at 581-82. The Court said the regulations were not discriminatory because they had "a proper relation to the purpose to be accomplished." *Id.* Therefore, "lawmakers may choose to apply the law to selective groups, like children attending school, without violating the equal protection clause provided that such application does not discriminate against protected classes (i.e., a state law requiring vaccination for boys but not girls)." *Hodge & Gostin*, *supra* note 1, at 862.

philosophical exemptions, the number of philosophical exemptions far exceeds the number of religious exemptions.¹⁰⁵

The philosophical exemption is arguably weaker to uphold against a constitutional challenge than the religious exemption, as it does not have the strength of a Free Exercise Clause argument on its side. Although the philosophical exemption is also rooted in the First Amendment, the exemption is premised on an objector's right to free speech, an argument that is even more likely to fail than a free exercise argument when weighed against potential threats to public health. Additionally, the philosophical exemption is prone to the same criticisms as the religious exemption with regard to an unvaccinated child's right not to serve as a martyr, the child's right to an open future, and the public health concerns, which I discuss below.

The philosophical exemption is also problematic because it is an example of catering to the minority. Such an exemption can only work when a small number of people elect to use it. As more individuals elect to use the exemption, the purpose of compelled vaccination is undermined. In *Jacobson v. Massachusetts*,¹⁰⁶ the Supreme Court expressed concern for the control of minority interests in these instances:

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent . . . may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that . . . a minority of persons . . . should have the power thus to dominate the majority when supported in their action by the authority of the State.¹⁰⁷

Because the philosophical exemption is the weaker of the two exemptions and is susceptible to much of the same criticism as the religious exemption, it is also in need of reconsideration. Furthermore, if the religious exemption were to be deemed improper or unconstitutional, this exemption would likely fall as well.

¹⁰⁵ See Feikin et al., *supra* note 60, at 3147 ("Overall, philosophical exemptions accounted for 87% of all exemptions.").

¹⁰⁶ 197 U.S. 11 (1905).

¹⁰⁷ *Id.* at 37-38.

III. OTHER ARGUMENTS FOR LIMITING THE EXEMPTIONS

A. *Rights of Unvaccinated Children: Martyrdom and a Child's Right to an "Open Future"*

While the arguments discussed above address the constitutionality of both the abstract concept of exemptions and the ways in which exemptions are granted, there is little mention of the rights of unvaccinated children. In this Section, I present several arguments for limiting exemptions based specifically on the preservation of the rights of unvaccinated children.

1. *Martyrdom and a Court's Consideration of a Child's Individual Views and Rights*

Many argue that exemption statutes should be eliminated or severely restricted because they make martyrs of young unvaccinated children who cannot decide for themselves if they wish to avoid the illnesses targeted by the vaccinations that they do not receive. In *Prince v. Massachusetts*,¹⁰⁸ the Supreme Court considered whether a legal guardian could allow her niece to sell Jehovah's Witness literature in public in violation of Massachusetts' child labor laws.¹⁰⁹ The Court ruled that: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹¹⁰

The Court further ruled in *Wisconsin v. Yoder*¹¹¹ that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child."¹¹² A national seven-year study of school-age children showed that children who were exempt from vaccinations for religious or philosophical reasons were thirty-five times more likely to contract measles than children who were

¹⁰⁸ 321 U.S. 158 (1944).

¹⁰⁹ See Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269, 283 (2003) (providing further background on *Prince v. Massachusetts*).

¹¹⁰ *Prince*, 321 U.S. at 170.

¹¹¹ 406 U.S. 205 (1972).

¹¹² *Id.* at 233-34. I should note that in *Yoder*, the Court ultimately ruled that Wisconsin's compulsory school attendance law requiring public education beyond the eight grade unduly burdened Amish and Mennonite families desiring to educate their children at home, and violated both the First and Fourteenth Amendments. See *id.* at 234 ("[T]he First and Fourteenth Amendments prevent the state from compelling respondents to cause their children to attend formal high school to age 16.").

vaccinated.¹¹³ When parents decide against vaccinating their children for either religious or philosophical reasons, they are making “martyrs” of their children, violating *Prince’s* interpretation of the First Amendment and its application to children. Therefore, an exemption statute that promotes such behavior also violates the interpretation contained in the Court’s ruling.

Furthermore, in his partial dissent in *Yoder*,¹¹⁴ Justice William Douglas argued that “no analysis of religious-liberty claims can take place in a vacuum”¹¹⁵ and that the Court should consider the views of a mature child¹¹⁶ when assessing cases involving religious exemptions as applied to compulsory education. Justice Douglas stated:

If the parents in this case are allowed a religious exemption [to compulsory school attendance], the inevitable effect is to impose the parents’ notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views. . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents’ religiously motivated objections.¹¹⁷

Although *Yoder* concerned a statute mandating compulsory school education and not an exemption to compulsory vaccination, courts should consider Justice Douglas’s argument when assessing the validity of exemption statutes. Applying Justice Douglas’s language, a child has “no other effective forum”¹¹⁸ than litigation to have his or her rights and views considered. If a court does not consider the child’s rights and views, these rights and views can be forever ignored and disregarded. While there are undoubtedly many individuals who would not object to this, such a practice seems to contradict the Court’s language in *Prince* and both the majority and dissenting opinions in *Yoder*, where the Court strives to preserve and recognize the rights of children.

Furthermore, although Justice Douglas specifically addressed the rights of mature children, the “dilemma of conflicting rights between parents and young children should also be recognized.”¹¹⁹ Many of

¹¹³ See Salmon et al., *supra* note 102, at 47 (1999).

¹¹⁴ 406 U.S. at 242 (Douglas, J., dissenting).

¹¹⁵ *Id.*

¹¹⁶ I should note that Justice Douglas does not specifically define the term “mature child,” although he later suggests that mature child is one who is “mature enough to express potentially conflicting desires.” *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Merrick, *supra* note 109, at 285 (emphasis added) (describing specific problems encountered when parents’ rights diverge from children’s rights).

the children affected by exemption statutes are not yet mature; they are therefore especially vulnerable and "in need of the state's protection."¹²⁰ Additionally, the views of an immature child are usually unknown, and "[t]here is no guarantee or even a valid assumption that [if] any of these children [live] to adulthood, they [will] have adopted and adhered to the theological principles of their parents' religions."¹²¹ Therefore, Justice Douglas's arguments supporting the rights and views of mature children should extend to immature children.

Finally, even though *Prince* and *Yoder* did not specifically address exemptions to state-compelled vaccination, any court addressing the validity of a vaccination exemption statute should evoke the language protecting children used in both cases, as such statutes also affect children's rights (specifically, the rights of unvaccinated children). Additionally, unlike *Prince* and *Yoder*, the exemption statutes threaten the physical health of children, which would likely heighten the consideration a court would provide for children's rights. Therefore, as the Court has considered children's rights with regard to statutes involving labor laws and compulsory school attendance, the Court (and lower state courts) should consider the rights of unvaccinated children when assessing the validity of exemption statutes for state-compelled vaccination.

2. *A Child's Right to an "Open Future"*

States and the Court should also reconsider religious and philosophical exemption statutes because they violate a child's right to an "open future."¹²² Joel Feinberg describes a "child's right to an open future," as a right "in-trust" which is to be "saved for the child until he is an adult."¹²³ Dena Davis further expands on this idea:

These rights can be violated by adults in ways that cut off the possibility that the child, when he or she achieves adulthood, can exercise them. An example is the right to choose one's spouse. Children and teenagers lack the legal and social grounds on which to assert such a right, but clearly the child, when he or she attains adulthood, will have that right. Therefore, the child *now* has the right not to be irrevocably betrothed to someone. Rights in this category include a long list: virtually all the important rights we believe adults have, but which must be protected now to be exercised later.¹²⁴

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Feinberg, *supra* note 13, at 124 (describing the concept of an "open future").

¹²³ *Id.* at 124-25.

¹²⁴ Dena S. Davis, *The Child's Right to an Open Future: Yoder and Beyond*, 26 CAP. U. L. REV. 93, 94 (1997).

Under this idea, the right to an "open future" forbids parents from refusing vaccinations for their minor children, who have the right to grow into their own futures where they will decide such issues for themselves.¹²⁵ The exemption statutes, which allow parents to refuse vaccinations, therefore violate Feinberg's idea of the right to an "open future."

One might argue in response that a true "open future" would preserve the child's ability to decide for himself at a later age whether to receive a vaccination. However, delaying such an important decision until the child is at an age where he can properly choose to be vaccinated increases his chances of exposure to a disease that he was not vaccinated against. Additionally, such delay would hinder the child from attending school in states without a philosophical exemption. Therefore, allowing children to decide for themselves at a later age whether to receive vaccinations is not consistent with Feinberg's "open future," as this option might expose the child to more vaccine-preventable illnesses, and deny the child a chance to enroll in public school.

B. Public Health Concerns and the Impracticality of Regulation and Proper Enforcement

In addition to the concerns discussed above relating to the rights of unvaccinated children, there are additional concerns that further justify eliminating or severely limiting exemptions. Below, I address the threat to public health, and the impracticality of both creating proper exemptions and regulating such exemptions to curb abuse.

1. The Threat to Public Health

A state's compelling interest in preserving public health and safety justifies compulsory vaccination as a prerequisite for school enrollment without exemption statutes. Many public health studies conclude that comprehensive vaccination policies are "greatly responsible for the significant reduction, and sometimes complete eradication, of many childhood diseases,"¹²⁶ while others have said that "childhood vaccinations are the most effective public-health

¹²⁵ Davis noted the common counterargument to this idea:

Many people argue that when children are raised within such an isolationist and high-demand religious culture as Jehovah's Witnesses, the idea that when they are 18 or 25 or whenever they magically become able to make truly autonomous choices, that they are, in Feinberg's words, "fully formed self-determining adult[s]," is not tenable.

Davis, *supra* note 124, at 94 (alteration in original) (quoting Feinberg, *supra* note 122, at 126).

¹²⁶ Hodge & Gostin, *supra* note 1, at 878.

measure in American history."¹²⁷ The threat of outbreaks justifies compulsory vaccination with no exemption statute.

Although the occurrence of outbreaks within communities that deny vaccinations to their children is not frequent because of the benefits of herd immunity,¹²⁸ when outbreaks do occur they are deadly and often affect the younger and more vulnerable school-age children within the community first.¹²⁹ The measles outbreak in 1991 among the Faith Tabernacle, a controversial religious sect in suburban Pennsylvania that was given exemption from childhood vaccination, is one such example: six children within the community died from a measles outbreak, yet there were no adult deaths.¹³⁰ As discussed above, the implications of widespread exemptions also affect vaccinated students as well as unvaccinated students.¹³¹ The 1996 measles outbreak in Utah discussed above¹³² demonstrated that as the exempt population grows, the risk that vaccinated students may contract measles from unvaccinated students significantly increases.

Additionally, the cluster problem further exacerbates threats to public health and justifies eliminating or further restricting the exemptions. A cluster problem occurs when those who apply for the exemptions live in clusters in close proximity to one another. This is

¹²⁷ Michael Specter, Comment, *Shots in the Dark*, NEW YORKER, Oct. 11, 1999, at 39.

¹²⁸ Herd immunity is the protection bestowed upon a population against an infectious disease when a critical mass of that population is immune to the particular disease. See Thomas May & Ross D. Silverman, "Clustering of Exemptions" As A Collective Action Threat to Herd Immunity, 21 VACCINE 1048 (2003) (examining the dangers that the "clusters of exemptions" pose to herd immunity).

Herd immunity also involves the idea that universal protection does not necessarily require universal vaccination. See Abi Berger, *How Does Herd Immunity Work?*, 319 BRIT. MED. J. 1466 (1999) (describing the rationale behind herd immunity in a large community). As one article explains,

Most vaccines provide both individual and community protection. Most of the diseases against which we vaccinate are transmitted from person to person. If a large enough proportion of individuals in a community is immunized, this proportion serves as a protective barrier against transmission of the disease in the community, thus indirectly protecting those who are not immunized for whatever reason as well as those few who received vaccine but are not protected (vaccine failures).

Alan R. Hinman et al., *Concurrent Sessions: Tools to Prevent Infectious Disease: Childhood Immunization: Laws that Work*, 30 J.L. MED. & ETHICS 122, 125 (Volume 30:3 Supp. 2002).

¹²⁹ See *Faith Healing Beliefs*, *supra* note 7 (noting the clash between church and state over the Faith Tabernacle exemptions).

¹³⁰ See *id.* (describing a meeting of the Faith Tabernacle).

¹³¹ See Hodge & Gostin, *supra* note 1, at 884 (describing outbreaks among vaccinated student populations).

¹³² See Salmon et al., *supra* note 102, at 51 (suggesting that Utah's exempt population may influence a measles outbreak). However, the Utah epidemic may also be associated with Utah's failure to require two doses of the measles vaccine; the state was one of a minority of states at the time which did not require two doses of measles vaccine as a prerequisite to school enrollment. See *id.* (discussing other factors that contributed to Utah's measles epidemic); see also Hodge & Gostin, *supra* note 1, at 878 (discussing the correlation between a state's school immunization rules and the decline in vaccine preventable diseases).

often the case with exemptors, as individuals cluster around a school or church, or locations such as Vashon Island, Washington¹³³ and Boulder, Colorado.¹³⁴ Both areas contain clusters of exemptors and have seen outbreaks of illnesses preventable by vaccination. "Recent studies have shown that clusters of exemptors, who are significantly more susceptible to contracting vaccine preventable illnesses, pose an increased risk of spread of disease not only to their unimmunized peers, but also to the surrounding, largely vaccinated population."¹³⁵

The cluster effect also increases the risk of an unvaccinated child contracting certain diseases. A study of measles outbreaks in Colorado showed that day care and elementary age children who were exempted for religious or philosophical reasons were sixty-two times more likely to become infected with measles.¹³⁶ The cluster effect therefore heightens the threats to public health and to the health of both vaccinated and unvaccinated individuals living in proximity to groups of exemptors.

Courts have used public health concerns to justify compelling vaccinations and withholding religious exemptions. In *Jacobson v. Massachusetts*, the Court upheld the right of states and local boards of health to compel vaccinations (in this case, small pox vaccinations in an area of Massachusetts where smallpox was "prevalent and increasing") using a "self-defense" argument: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."¹³⁷ In *Wright v. DeWitt School District*,¹³⁸ the Supreme Court of Arkansas held that a compulsory vaccination law with no religious exemption is constitutional because the right of free exercise

¹³³ On Vashon Island, "nearly one in five schoolchildren opted out of immunizations in the year 2000, as some residents prefer alternative therapies and homeopathy to vaccines. Unfortunately, outbreaks of whooping cough . . . struck the island every year between 1995 and 1999, hospitalizing some babies and leaving other children with chronic asthma." Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 356 (2004) (citing Donald G. McNeil Jr., *When Parents Say No to Child Vaccinations*, N.Y. TIMES, Nov. 30, 2002, at A1).

¹³⁴ See May & Silverman, *supra* note 128, at 1048.

¹³⁵ Silverman, *supra* note 3, at 285; see also D.V. Rodgers et al., *High Attack Rates and Case Fatality During a Measles Outbreak in Groups with Religious Exemption to Vaccination*, 12 PEDIATRIC INFECTIOUS DISEASE J. 268, 268 (1993) (addressing a large measles outbreak among members of two unvaccinated Philadelphia, Pennsylvania church groups infecting almost all children younger than fourteen); J.E. van Steenberg, *Measles Outbreak—Netherlands, April 1999–January 2000*, 49 MORBIDITY & MORTALITY WKLY. REP. 299, 300–01 (2000) (discussing the effects of exemptions in the Netherlands); Lee Siegel, *Whooping Cough Spreads Through Utah; 30 of the Hundreds Exposed Are Polygamous Family Members*, SALT LAKE TRIB., Sept. 12, 1998, at B1 (describing the rapid spread of whooping cough throughout non-immunized communities).

¹³⁶ Feikin et al., *supra* note 60, at 3149 (assessing various immunization studies comparing vaccinated and unvaccinated school-age children), cited in Merrick, *supra* note 109, at 275.

¹³⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

¹³⁸ 385 S.W.2d 644 (Ark. 1965).

is subject to reasonable regulation for the good of the community as a whole.¹³⁹

2. *The Impracticality of Regulation and Proper Enforcement*

Even if religious exemptions were constitutional, states should consider eliminating the exemptions because they are difficult to enforce. It is hard to establish and apply a proper test for who might qualify for the exemption. The court evaluation required for both the "organized" religion exemption and the sincerity exemption present constitutional challenges to the Establishment Clause, as discussed above.¹⁴⁰ In *International Society for Krishna Consciousness, Inc. v. Barber*,¹⁴¹ the Second Circuit described the difficulty of attempting to discern the sincerity of an individual's religious beliefs:

Sincerity analysis seeks to determine the subjective good faith of an adherent in performing certain rituals. The goal, of course, is to protect only those beliefs which are held as a matter of conscience. Human nature being what it is, however, it is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief.¹⁴²

Additionally, the religious exemption form system used by many states is prone to abuse; there is little oversight regarding who is claiming these exemptions, and therefore "anyone who wants it, gets it."¹⁴³ As Ross D. Silverman points out, heavy abuse of the current system is common, and "the lack of statutory authority, in at least twenty-three states, to challenge claims based on religious beliefs, or the relaxed enforcement of existing rules, allows virtually any applicant in such states to gain exemption."¹⁴⁴ The growth of the Internet has aided this abuse; several websites contain sample form letters that individuals may download, sign, and submit to elementary schools to ask for an exemption.¹⁴⁵ The Internet has also provided an outlet for several of the radical groups that oppose compelled vaccination to spread misinformation about vaccinations, promoting individuals to

¹³⁹ *Id.* at 648.

¹⁴⁰ See discussion *supra* Part II.A.1 (First Amendment Concerns: The Establishment Clause).

¹⁴¹ 650 F.2d 430 (2d Cir. 1981).

¹⁴² *Id.* at 441 (citations omitted).

¹⁴³ Donald G. McNeil Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, at F1 (quoting Daniel A. Salmon of the Johns Hopkins School of Public Health).

¹⁴⁴ Silverman, *supra* note 3, at 285.

¹⁴⁵ See Concerned Parents for Vaccine Safety, *Here Are Two Examples of a Religious Exemption Letter* (providing examples of two form letters, one extensively quoting from the Bible, that provide "great ideas on how to write your own religious exemption."), at <http://web.archive.org/web/20040214002204/home.sprynet.com/~gyrene/example.htm> (last visited Mar. 19, 2005).

seek exemption any way they can,¹⁴⁶ which often involves improperly claiming religious exemption.¹⁴⁷ In all of these ways, the Internet has become an instrument to further exemption abuse.

IV. POSSIBLE SOLUTIONS

There are many possible approaches towards resolving the various exemption problems discussed above. Below, I discuss several solutions and their practicality.

A. Mandatory Vaccination with No Exemption

One solution, perhaps the most extreme of all proposed solutions, is to encourage states to abolish the exemptions completely or to narrow them further. Interest groups¹⁴⁸ and influential scholars who oppose the exemptions can lobby state legislatures to abolish the exemptions for public health and public policy concerns. These groups can also lobby Congress, which has the power to withhold government funding from states that do not adopt certain policies. This strategy would be similar to methods that have been employed to encourage states to adopt certain child abuse laws and child welfare programs.¹⁴⁹

¹⁴⁶ Recent publicity about the ineffectiveness or dangers associated with vaccinations is often blown out of proportion. See, e.g., Associated Press, *Study: Cervical Cancer Vaccine May Wane During Ovulation*, Aug. 5, 2003 ("New research suggests an experimental vaccine against cervical cancer might lose some of its effectiveness when a woman ovulates."), available at http://www.thebody.com/cdc/news_updates_archive/2003/aug8_03/cancer_vaccine.html.

¹⁴⁷ See *infra* Part IV (More Practical Solutions) for further discussion of the spread of misinformation and the means various organizations are using to counter this erroneous information.

¹⁴⁸ See, e.g., *Jeopardizing Children's Lives*, *supra* note 80 (advocating the repeal of religious exemption laws).

¹⁴⁹ See Richard A. Gardner, *Revising the Child Abuse Prevention and Treatment Act: Our Best Hope for Dealing with Sex-Abuse Hysteria in the United States*, 5 INST. FOR PSYCHOL. THERAPIES J. (1993) (stating that, in order for states to qualify for federal monies, they had to "provid[e] immunity from prosecution for all those reporting child abuse and required specific persons (such as health-care professionals, law-enforcement officials, teachers, and school administrators) to report suspected child abuse to the appropriate child protection agency"), available at http://www.ipt-forensics.com/journal/volume5/j5_1_3.htm. As one source explains,

In the early 1970's, hearings were held in Congress regarding the long ignored issue of child abuse. Subsequent to these hearings, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA) . . . which provided federal funding to states with which to engage in child protection investigation, intervention, and criminal prosecutions. In order to receive this matching and additional federal funding, states had to come into compliance with the federal law, by enacting matching laws that provided for anonymous reporting, mandated reporting, immunity to reporting parties, and additional grants for the "successful prosecution" of child abusers.

Menstuff, *False Accusations of Child Abuse*, at <http://www.menstuff.org/issues/byissue/falseaccusation.html> (last visited Mar. 19, 2005).

Public health advocates can also bring a constitutional challenge to the religious exemption, arguing that the religious exemption statutes improperly advance religion and violate the Establishment Clause. For the reasons discussed in Part II.A.1 above, the Supreme Court should follow the district court's ruling in *Sherr v. Northport-East Northport Union Free School District*¹⁵⁰ and declare exemption statutes unconstitutional because they violate the second and third prongs of the *Lemon v. Kurtzman*¹⁵¹ test. The court demonstrated that, under the Constitution, "certain religious denominations cannot be granted privileges not afforded to other denominations or religions"¹⁵² and that the "restriction of [an] exception to 'recognized religious organizations' clearly requires that the government involve itself in religious matters to an inordinate degree."¹⁵³ It is not likely that such an approach would be effective, however, because the Supreme Court has previously denied certiorari to cases dealing with the constitutionality of the exemption system.¹⁵⁴ This approach will hopefully proliferate to more state courts and modify state law in areas that allow exemptions.

B. Fundamental Changes for a Workable System

Another unlikely but efficient approach could involve a paradigm shift in the construction of exemption statutes. Ideally, a state legislature would draft an exemption that would both preserve the religious freedoms guaranteed under the Free Exercise Clause and avoid the Establishment Clause violation presented by the current religious exemption statutes. The ideal exemption would be easier to qualify for than the "organized" religion and sincerity analysis exemptions, yet it would impose a higher threshold than the form exemption (whereby the applicant needs to only fill out a form to qualify for an exemption) to avoid the problems of abuse and overuse in the current system. Until a state legislature proposes this ideal exemption statute, however, states must review their current statutes to respond to ongoing or potential constitutional challenges. Additionally, this "ideal" exemption remains, for now, simply an ideal. Therefore the more practical solutions discussed below are more likely to serve as feasible solutions to the problems surrounding the current vaccination system.

¹⁵⁰ 672 F. Supp. 81, 89 (E.D.N.Y. 1987) ("The clause of § 2164(9) at issue in this litigation runs afoul of at least two of the three elements of the *Lemon* test.").

¹⁵¹ 403 U.S. 602 (1971).

¹⁵² *Jeopardizing Children's Lives*, *supra* note 80.

¹⁵³ *Sherr*, 672 F. Supp. at 90.

¹⁵⁴ See, e.g., *Brown v. Stone*, 378 So. 2d 218, 224 (Miss. 1979) (declaring Mississippi's religious exemption statute unconstitutional), *cert. denied*, 449 U.S. 887 (1980).

Another solution might involve creating or promoting a commonly accepted community practice of requiring immunizations when there are reported outbreaks of particular diseases in a nearby region. Under this system, in states with religious or philosophical exemptions, a parent can still choose not to immunize her child; however, the parent can be forced to obtain specific immunizations if the school can demonstrate an actual danger. One significant shortcoming of such a system, however, is the threat of creating a slippery slope; such a system would sound ideal to the "borderline" parent who would otherwise vaccinate her child but chooses not to knowing that the child can simply be vaccinated at a later time should nearby incidences of disease arise. The parent might therefore be more likely to opt out of vaccination.

Additionally, the entire purpose of vaccination is to promote public health and preventative medicine; if too many people take advantage of such an exemption, these values are undermined. If practiced in large numbers, this system can pose a serious threat to public health because as more exemptions are granted in an area, the benefits of herd immunity decrease and the threats of the cluster problem and a potential outbreak increase in that area.

C. The More Practical Solutions

Perhaps the most practical way to help curb exemption abuse is to correct any misinformation about vaccinations so that fewer individuals will improperly seek exemption for this reason. Public informational campaigns can be used to this end. The Centers for Disease Control and Prevention's ("CDC") National Immunization Program has already identified and refuted several common misconceptions regarding vaccination,¹⁵⁵ including the ideas that disease reduction is not due to vaccination but rather to improvements in hygiene and sanitation; that most people who become sick with diseases are vaccinated; that vaccines regularly cause harmful side effects and illnesses; and that vaccinations are no longer necessary in the United States because of the elimination of diseases.¹⁵⁶ In addition, Paul Offit and Louis Bell address several popular and false vaccination myths,¹⁵⁷ including the ideas that infants are too young to be immunized, that current vaccines weaken the immune system, that vaccines contain

¹⁵⁵ See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 6 COMMON MISCONCEPTIONS ABOUT VACCINATION AND HOW TO RESPOND TO THEM (1996) (addressing some common misunderstandings about vaccination), at <http://www.cdc.gov/nip/publications/6mishome.htm>.

¹⁵⁶ See Hodge & Gostin, *supra* note 1, at 886 (listing these ideas as common misperceptions).

¹⁵⁷ See PAUL A. OFFIT & LOUIS M. BELL, VACCINES: WHAT EVERY PARENT SHOULD KNOW 107-20 (1999) (reviewing and dispelling several prominent myths regarding child vaccinations).

preservatives and other infectious agents that may harm individuals,¹⁵⁸ and that pharmaceutical companies manufacture batches of vaccine that cause high rates of adverse events.¹⁵⁹

Researchers have also conducted studies to address new theories and popular beliefs that arise about the dangers of particular vaccinations; these studies should be publicized more heavily, and researchers should further expand this research. Since autism often appears in the second year of life, around the same time children receive certain vaccines, many people have speculated that the certain vaccines, specifically the measles, mumps and rubella ("MMR") vaccine, might cause autism.¹⁶⁰ Studies conducted in the United States, the United Kingdom, and Denmark all found that children with autism were not more likely than other children to have received the MMR vaccine, or to have received the MMR vaccine recently.¹⁶¹

Congress became involved in the effort to impart correct information regarding vaccinations to the public. In 1986, Congress enacted the National Childhood Vaccine Injury Act ("NCVIA")¹⁶² to help disseminate more information about vaccinations and to address the increasing number of liability cases for injuries resulting from the use of vaccines. The NCVIA established four programs: The National Vaccine Program,¹⁶³ the Vaccine Injury Compensation Program,¹⁶⁴ the

¹⁵⁸ This idea has been popularized by recent arguments that the polio vaccination may have spread HIV. See, e.g., Lawrence K. Altman, *New Book Challenges Theories of AIDS Origins*, N.Y. TIMES, Nov. 30, 1999, at F1 (reviewing and discussing EDWARD HOOPER, *THE RIVER: A JOURNEY TO THE SOURCE OF HIV AND AIDS* (1999)); Hodge & Gostin, *supra* note 1, at 887 (referring to Altman book review).

¹⁵⁹ This high rate of adverse events is also called "hot lots." OFFIT & BELL, *supra* note 157, at 107–20; see also Hodge & Gostin, *supra* note 1, at 886 (noting that the CDC includes the idea of harmful vaccines among the list of misconceptions it is seeking to debunk).

¹⁶⁰ See Tex. Med. Ass'n, *supra* note 100 (addressing the concerns of Texans regarding the safety of vaccinations).

¹⁶¹ See K.M. Madsen et al., *A Population-based Study of Measles, Mumps, and Rubella Vaccination and Autism*, 347 NEW ENG. J. MED. 1477, 1480 (2002) ("This study provides three strong arguments against a causal relationship between MMR vaccination and autism."); see also Tex. Med. Ass'n, *supra* note 100 ("All of these studies found that children with autism were not more likely to have received the MMR vaccine.").

¹⁶² National Childhood Vaccine Injury Act of 1986, Pub. L. 99-660, 100 Stat. 3756 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-34 (2000)); see also Hodge & Gostin, *supra* note 1, at 885 ("[T]he [NCVIA] compensates persons who suffer from certain vaccine-induced injuries . . ."); Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL., POL'Y & L. 59 (1999) (describing the impact of the NCVIA).

¹⁶³ This program in the Department of Health and Human Services is "responsible for most aspects of vaccination policy—e.g., research, development, safety and efficacy testing, licensing, distribution, and use . . ." Hodge & Gostin, *supra* note 1, at 885.

¹⁶⁴ This program compensates persons who suffer from certain vaccine-induced injuries according to values set in a Vaccine Injury Table. Though well-intended, this program has been highly controversial. While it has sharply reduced litigation, the "no-fault" adjudication system

Vaccine Adverse Events Reporting System,¹⁶⁵ and a vaccine information system.¹⁶⁶

All of these efforts can be further expanded and targeted to reach audiences living in specific geographic regions, including areas with higher percentages of exemptors, and states that allow for both philosophical and religious exemptions. Interest groups can also raise funds to finance public health campaigns that promote child vaccination generally and portray vaccines in a positive light and seek to correct the common misconceptions surrounding vaccination.

CONCLUSION

In light of the constitutional problems, threats to public health and the rights of unvaccinated children, and the difficulty in preventing the overuse and abuse of exemptions, the current exemption system is in need of review and reform, if not complete abolition. While informational campaigns and lobbying efforts can help decrease the widespread abuse of the exemptions, the exemptions are in need of fundamental changes to survive constitutional muster. Only then might an exemption system exist that can reconcile the competing interests of those concerned with upholding the Establishment Clause with those who strongly advocate for the Free Exercise Clause.

has been time consuming, costly, and adversarial. Nearly three-fourths of claims have been dismissed.

Id.

¹⁶⁵ This reporting system "requires health care providers and manufacturers to report certain adverse events from vaccines." *Id.*

¹⁶⁶ This information system "requires all health care providers to give parents standardized written information before administering certain vaccines." *Id.*